IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-34 and 82-226

AMERICAN PAPER INSTITUTE, INC.,
Petitioner

v.

AMERICAN ELECTRIC POWER SERVICE CORP., *et al.*,
Respondents

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner

v.

AMERICAN ELECTRIC POWER SERVICE CORP., *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT ELECTRIC UTILITIES

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QUESTIONS PRESENTED

This case concerns the validity of rules promulgated by the Federal Energy Regulatory Commission under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). The questions presented are:

1. Whether the FERC's rule which requires utilities to offer to purchase power from qualifying cogeneration and small power production facilities at the utility's "full avoided cost" comports with the statutory standards set forth in section 210(b) of PURPA and whether the FERC adequately justified its rule in light of the statutory criteria.

2. Whether the FERC's blanket exemption of qualifying facilities from the interconnection provisions of Federal Power Act sections 210 and 212 (added to the Federal Power Act by PURPA) violates PURPA section 210(e)(3)(B), which prohibits the FERC from exempting qualifying facilities from these provisions.

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BRIEF FOR RESPONDENT ELECTRIC UTILITIES

STATEMENT OF THE CASE

A. The Statute

The Public Utility Regulatory Policies Act (PURPA or the Act) is one part of the complex of five major statutes enacted in 1978 and known jointly as the National Energy Act. As this Court observed in *FERC v. Mississippi*, 102 S.Ct. 2126, 2132 (1982), "Congress believed that increased use of [cogeneration and small power production facilities] would reduce the demand for traditional fossil fuels," especially oil and natural gas. Congress, through PURPA, sought (1) to increase the efficiency with which the nation employs its scarce energy-related resources and (2) to provide rate protection to

consumers. PURPA § 2(1), 16 U.S.C. § 2601(1) (Supp. V).

Both the Administration and Congress perceived that two institutional barriers were impeding the development of otherwise justified cogeneration projects.[1] First, some utilities, it was believed, discouraged cogeneration by refusing (i) to buy the cogenerator's surplus power or to do so at reasonable rates or (ii) to provide, at reasonable rates, the back-up power the cogenerator might require. The second barrier was regulatory: under then-existing law, any cogenerator which sold surplus power might be deemed a "utility" and thereby become subject to intrusive and burdensome utility-related statutes and regulations.

The cogeneration provisions of PURPA were designed to eliminate these barriers and thereby permit cogeneration to add to the nation's energy resources in a way that is fair both to cogenerators which qualify for the benefits of the Act (so-called "qualifying facilities") and to utility ratepayers. The Act eliminated the first barrier (1) by requiring utilities to purchase cogenerated power and to sell cogenerators the additional power they need, each at reasonable rates, and (2) by authorizing qualifying cogenerators to apply to the Federal Energy Regulatory Commission (FERC or Commission) for orders permitting interconnection with utilities.

To assure that rates by which utilities purchase power from cogenerators (referred to as "purchase rates") would be fair, Congress mandated particular standards that the FERC was to follow in promulgating the rules pursuant to which the States would set purchase rates. Under section 210(b) of PURPA, 16 U.S.C. § 824a-3(b)

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[1] As used herein, "cogeneration" refers to both cogeneration and small power production under PURPA.

The listing of all parents and affiliates of the Respondent Electric Utilities required by Rule 28.1 appears in Appendix A to the Brief of Respondents in Opposition to the petitions for writs of certiorari in Dkt. Nos. 82-34 and 82-226.

(Supp. V), purchase rates "shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and . . . shall not discriminate against qualifying [facilities]." Congress also included an express limitation: no purchase rate rule "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." *Id.*

Congress recognized that a qualifying facility could not sell power to a utility unless it could "interconnect" its facility with the purchasing utility. To permit this, in PURPA it amended the Federal Power Act (FPA) by adding sections 210 and 212, 16 U.S.C. §§ 824i, 824k (Supp. V), which authorize qualifying facilities to obtain orders for such interconnections, under specified conditions, from the FERC. PURPA §§ 202, 204.

To eliminate the second barrier to cogeneration, that of overly intrusive regulation, Congress gave the FERC broad authority, in section 210(e) of PURPA, 16 U.S.C. §§ 824a-3(e) (Supp V), to exempt qualifying facilities from certain federal and state regulatory requirements. However, in PURPA section 210(e)(3)(B), 16 U.S.C. § 824a-3(e)(3)(B) (Supp. V), it expressly prohibited the FERC from exempting qualifying facilities from the interconnection provisions of sections 210 and 212 of the FPA.

B. The Commission's Rules

The Commission ordered state commissions to set purchase rates for qualifying facilities built after the enactment of the statute at a level equal to the utility's "full avoided cost." 18 C.F.R. § 292.304. The rule defines "full avoided cost" as equivalent to the statutory ceiling for purchase rates (*i.e.*, "incremental cost"), meaning the full cost which the utility would have incurred had it provided the power on its own. *Id.* at § 292.101(b)(6). The effect of the rule is to deny any share of the potential rate savings to the consumers of the participating utility, despite section 210(b)'s direction that rates be "just and

reasonable to the electric consumers." In its "interconnection rule," 18 C.F.R. § 292.303(c), the Commission exempted all qualifying facilities from the requirements of FPA sections 210 and 212, and ordered interconnections on a blanket basis, despite the exemption limitation of PURPA section 210(e)(3)(B).

C. The Decision of the Court of Appeals

The court of appeals considered four challenges to the FERC's cogeneration rules. In a unanimous opinion written by Judge Wilkey, it sustained the FERC on two of the challenges, but vacated both the full avoided cost and interconnection rules.

1. *Full Avoided Cost Rule*

The court set aside the purchase rate rule because "It is apparent that the Commission did not" consider the statutory criteria for such rates "or at least if it did, its rationale and process of consideration were never made explicit." Pet. App. at B-9.[2] The court held that "Congress made a clear distinction between a 'just and reasonable' rate and a rate based on the full avoided cost, though the two *may* coincide." *Id.* at B-10 (emphasis in the original). It examined, in light of this statutory distinction, the reasons offered by the Commission for adopting a rule which, in every case and regardless of circumstances, equates full avoided cost rates with rates that are just and reasonable to consumers. It found that the Commission either failed to consider the hard questions which the "just and reasonable" standard raises, or, if it did consider them, failed to explain how its rule could be reconciled with the explicit requirements of the statute.

The court did *not* hold that a full avoided cost rule would always and necessarily conflict with the statute. Rather, it held "that FERC has not adequately justified

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[2] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari in No. 82-34.

its adoption of the full avoided cost standard." *Id.* As the court emphasized in its order denying rehearing, the FERC is free to adopt a full avoided cost rule, if it can "present a cogent justification of its rule in light of the statutory instructions." *Id.* at B-204.

2. *Interconnection Rule*

The court set aside the Commission's blanket exemption of cogenerators from the interconnection provisions of the FPA. It held that since section 210(e)(3)(B) of PURPA expressly prohibits the exemption of qualifying facilities from FPA sections 210 and 212, a rule granting such an exemption violates the statute. Pet. App. at B-22-23. The court found "wholly unconvincing" the FERC's argument that it had implied authority to order interconnections on a blanket basis. It also found "counterintuitive and inconsistent with the statute's explicit provisions" the FERC's contention that the limitation of the exemption authority applied only when cogenerators are targets of, but not applicants for, interconnection orders. Pet. App. at B-24-25.[3]

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[3] The court rejected challenges to two additional aspects of the Commission's rules. First, the court sustained the FERC's "simultaneous purchase and sale" rule, which requires utilities to make net payments to cogenerators for electricity which cogenerators generate and consume for themselves, even though as the court explained, that rule is based upon the "fiction" that this electricity is simultaneously purchased by a utility (at full avoided cost) and sold back to the cogenerator (at the utility's retail rate, typically based on lower embedded costs). Pet. App. at B-17. Second, the court sustained the Commission's refusal to include criteria respecting "fuel use" in its regulation defining "qualifying" cogenerators, thus permitting new oil- or gas-fired cogenerators to qualify for the benefits of PURPA. The court did so even though the principal purpose of the statute was to reduce the use of oil and gas and even though PURPA explicitly authorizes the Commission to include restrictions on fuel use in its definition of "qualifying" cogenerators. PURPA § 201, 16 U.S.C. § 796(18)(B) (Supp. V).

SUMMARY OF ARGUMENT

When Congress enacted PURPA, it recognized (1) that cogeneration, properly implemented, could provide rate savings to consumers and (2) that interconnections between cogenerators and utilities, if not properly implemented, could threaten the reliability of electric transmission systems. Respondent Utilities challenged the Commission's implementing rules because they believe those rules fail to comply with the explicit requirements of the statute, and thereby do violence to the basic objectives of the Act.

A. The Full Avoided Cost Rule

In PURPA, Congress intended to eliminate the barrier to cogeneration resulting from the refusal of some utilities to buy cogenerated power at reasonable rates. It did so by directing the FERC to promulgate rules by which utilities would buy cogenerated power at a fair price, as determined under specified principles, one of which requires these purchase rates to be "just and reasonable to the electric consumers of the electric utility." In adopting this standard, with its well understood consumer protection meaning, Congress contemplated that some of the benefits of cogeneration would be used to provide rate savings to consumers, requiring the Commission to consider carefully alternatives that would accomplish that objective.

Instead, the Commission ignored the statutory mandate, and adopted the full avoided cost rule, which provides no savings to utility ratepayers. It equated the statutory limitation that purchase rates never exceed full avoided cost with rates that are "just and reasonable" to consumers, and thereby adopted the statutory ceiling as the rate floor.

The justifications to support the rule advanced by the Commission in promulgating the rule—and the post-hoc rationalizations advanced by counsel—reflect the assumption that the statute gives the FERC unfettered discretion "to encourage cogeneration" without any limitation other than that purchase rates not exceed full avoided cost. This premise is mistaken; the criteria of section 210(b) require the Commission to consider other countervailing factors, including the interests of ratepayers. Because the FERC's construction is inconsistent with the statute and would frustrate Congressional intent, it must be rejected. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

B. The Interconnection Rule

Congress intended that interconnections between cogenerators and utilities would be governed by the interconnection provisions it added to the FPA, and prohibited the FERC from exempting cogenerators from these provisions. Notwithstanding this express limitation on its exemption authority, the FERC exempted cogenerators from the pertinent provisions of the FPA. It did so based upon a misreading of the legislative history, and upon its contention that the statutory limitation on its exemption authority applies only when cogenerators are targets of, but not when they are applicants for, interconnection orders. This construction, however, would deprive unambiguous statutory terms of their plain meaning and render them essentially meaningless. Petitioners' claim that to enforce the interconnection aspects of the statute would have adverse policy consequences is mistaken and, in any event, cannot justify refusal to implement the statute as it was enacted.

ARGUMENT

I. THE FULL AVOIDED COST RULE IS UNLAWFUL

A. The Statute Contemplates that the Purchase Rate Rule Will Afford Rate Savings to Consumers

1. *The Standards of PURPA Section 210(b) Direct the FERC to Consider Distinct, and Potentially Competing, Interests*

The statute removes a barrier which Congress perceived was inhibiting cogeneration by directing the FERC to issue rules, *inter alia*, requiring utilities to purchase cogenerated power. PURPA § 210(a), 16 U.S.C. § 824a-3(a) (Supp. V). The statute thereupon sets forth three ratemaking principles to govern the FERC's purchase rate rule so that rates for these transactions will be fair: the rates (1) are to be "just and reasonable to the electric consumers of the electric utility," (2) "in the public interest" and (3) are not to "discriminate against qualifying cogenerators or qualifying small power producers." PURPA § 210(b). Section 210(b) further specifies that no purchase rate rule "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." By both its terms and its structure, the statute requires the Commission to fashion a purchase rate rule which is responsive to the interests of consumers and of the public, each of which is distinct from, and potentially competes with, the interests of cogenerators.

2. *The "Just and Reasonable to Consumers" Standard Has a Traditional, Rate-Related Meaning*

When Congress included the requirement that purchase rates be "just and reasonable to the electric consumers of the electric utility," it knowingly employed an established term of art. The "just and reasonable" standard has a traditional, generally understood meaning developed over many years, in large part in opinions of this Court.

Central to the "just and reasonable" standard are two concepts, one procedural, the other substantive. Procedurally, the standard calls for a balancing of the interests of the affected parties. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 770, 792 (1968). Substantively, the overriding purpose of the standard is to protect consumers.[4]

The very language used in section 210(b)—that purchase rates be "just and reasonable *to the electric consumers of the electric utility*"—demonstrates that Congress intended to employ this traditional consumer protection meaning. The Conference Report (H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 97, 98 (1978)) confirms this intention by specifying (1) that the Commission interpret the "just and reasonable" standard "in a manner which looks to protecting the interests of the electric consumer in receiving electric energy at equitable rates" and (2) that the standard requires the Commission to set rates at "*the lower of*" full avoided cost and a rate which meets the specific criteria prescribed in section 210(b) (emphasis supplied).

The "just and reasonable" standard requires the FERC to examine closely the effect on utility consumers of purchase rate alternatives, and to balance the interests of consumers with those of cogenerators and the public.[5] *See Permian Basin Area Rate Cases*, 390 U.S. at 770.

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[4] *NAACP v. FPC*, 425 U.S. 662, 666 (1976) (the just and reasonable standard "prevent[s] consumers from being charged any unnecessary . . . costs"); *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388-89 (1959) (prices must be set "at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest"; the "overriding intent . . . [is] to give full protective coverage to the consumer as to price . . ."); *see also* cases cited in *NAACP*, 425 U.S. at 666 n.3 and 670 n.5.

[5] *See* note 9, *infra*.

By requiring the FERC to undertake this balancing, rather than simply mandating a rate equal to full avoided cost by statute, Congress contemplated that the utility's ratepayers would be afforded some share of the economic benefits of cogeneration, in the form of rate savings. Yet, as the Commission conceded when issuing its regulations, the full avoided cost rule "will not produce any rate savings to the utility's customers." Pet. App. at B-65. This does not necessarily render the rule invalid. However, if the FERC is to sustain a rate which fails to provide rate savings to utility consumers, it must offer a sound explanation of how its rule is nonetheless consistent with the explicit requirement of the statute—a responsibility which, we shall show, *infra*, it has not met.

3. *The Avoided Cost Limitation Is Not a Substitute for the "Just and Reasonable" Standard*

The full avoided cost rule is derived from the statutory ceiling on purchase rates—the limitation that the rule not provide for a rate which exceeds the utility's "incremental cost" of alternative electric energy. The terms and structure of section 210(b) make clear that Congress intended the incremental cost limitation to be distinct from the "just and reasonable" standard and, certainly, that it did not intend to equate the two in all cases. Unlike the three criteria (including the "just and reasonable" standard) which precede the incremental cost limitation, that limitation is not a normative standard at all. It does not obviate the need for any balancing or reconciliation of interests; rather, it fixes an upper boundary for permissible Commission action.

The distinction between the incremental cost limitation and the "just and reasonable" requirement, and the fact that Congress did not intend the former to be a substitute for the latter, is evident in the Conference Report. The Report (at 98, emphasis supplied) specifies that the FERC set rates at *"the lower of"* full avoided cost and a rate which satisfies the rate criteria prescribed

by section 210(b), and further states that the avoided cost limitation "*is meant to act as an upper limit on the price at which utilities can be required under this section to purchase electric energy.*"

The rule converts what Congress imposed as the ceiling on purchase rates—full avoided cost—into the floor. As stated by the court of appeals, "By ordering that the purchase rate be equal to the full avoided cost in every case, FERC has, without convincing explanation, simply adopted as a uniform rule the maximum purchase rate specified in the statute." Pet. App. at B-10.[6]

On its face the full avoided cost rule thus appears to treat the "just and reasonable" standard as surplusage and a nullity. As this Court recently held, in *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 513 (1981):

> Adoption of petitioners' interpretation would effectively write § 6(b)(5) [of OSHA] out of the Act. We decline to render Congress' decision to include a feasibility requirement nugatory, thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect.

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[6] While the FERC adheres to the statutory ceiling of full avoided cost in its own rules, it invites the States to go above that ceiling:

> While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, the States are free, under their own authority, to enact laws of [sic] regulations providing for rates which would result in even greater encouragement of these technologies.

Pet. App. at B-62. This suggestion is of dubious constitutional validity in that there is federal preemption over wholesale electric rates and PURPA § 210(f), 16 U.S.C. § 824a-3(f) (Supp. V), requires the state commissions to implement the cogeneration rules, which PURPA § 210(b) specifies may not provide for a rate exceeding full avoided cost. *See, e.g., Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta*, 102 S.Ct. 3014, 3022 (1982); *Townsend v. Swank*, 404 U.S. 282, 286 (1971).

Since the Commission has rendered the "just and reasonable" standard "redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative," *Colautti v. Franklin*, 439 U.S. 379, 392 (1979), its invalidation must be sustained. As noted *supra*, the Commission can only adopt a rule which sets all rates under the rule at the statutory ceiling if it considers and cogently explains how such a rule gives meaning to the "just and reasonable" standard. As we now show, no such explanation has been offered.

B. The FERC's Justifications for the Rule Fail to Explain How It Can Be Squared with the Statute

1. *The Specific Justifications Offered by the Commission Are Inadequate*

The Commission, when adopting its regulation, provided scarcely any justification for the full avoided cost rule. What "reasons" it did advance were confined to a few sentences (*see* Pet. App. at B-65-66) which, as the court of appeals found, fail to offer any reasoned explanation of how the rule takes meaningful account of the criteria specified in section 210(b).[7]

The legal deficiencies of the FERC's rationale go beyond the manifest inadequacies of its specific justifications for the rule. In its order promulgating the rule, and subsequent order denying rehearing, the FERC never specifically addressed the application of the "just and reasonable" standard.[8] It never explained how it was

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[7] As we show at pages 19-20, *infra*, petitioners' attempts, first raised in appellate advocacy, to claim that the Commission has satisfied the "just and reasonable" standard are without merit.

[8] Prior to its appellate briefs, the FERC's only mention of the application of the "just and reasonable" standard to the purchase rate rule is contained in a Commission Staff Paper, which recognizes the statutory interest in a rate below full avoided cost:

interpreting the standard or what meaning it was assigning to it, and never explained how a rule which concededly provides no savings to utility consumers comports with that standard.[9]

The "just and reasonable" standard contemplates that the Commission would, at the least, consider carefully alternative rules which would capture some rate savings for consumers. The Commission considered only one alternative to the full avoided cost rule—namely, the "split-the-savings" approach of dividing the benefits of the transaction between buyer and seller on the basis of their respective costs. The Commission rejected this approach, which is common in the electric utility industry, because it believed that it would impose upon qualifying facilities the type of intrusive regulation which Congress directed it to avoid. Pet. App. at B-64-66.

> So long as the price is less than the alternative cost to the utility, the buying utility's ratepayers benefit from such transactions, and the statute would seem to be satisfied.

Joint Appendix at 30.

[9] The Commission's failure to explain its interpretation of the "just and reasonable" standard is particularly troublesome because of its failure to make any effort to take cogenerator production costs into account in promulgating rates under section 210(b). The fact that Congress did not intend to subject cogenerators to intrusive utility-type regulation did not authorize the Commission to ignore entirely cogenerators' costs in balancing their interests with those of ratepayers. As this Court has frequently recognized, production costs are a critical factor in determining "just and reasonable" rates. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. at 769 and 791-92 (the Commission is to consider the "financial . . . requirements" of the parties seeking to charge "just and reasonable" rates); *Acker v. United States*, 298 U.S. 426, 428 (1936) (the "prime factor is the . . . cost . . ." of providing the service for which the rate is being charged). *Cf. Mobil Oil Corp. v. FPC*, 417 U.S. 283, 301 (1974).

In this regard, the Conference Report explained that while Congress wanted to avoid establishing "utility type regulation" over cogenerators, it did not contemplate that they be exempt from in-

By its terms, however, the Commission's concern applies only to approaches which require case-by-case examination of the costs incurred by individual cogenerators. It has no bearing on the numerous methods of computing purchase rates that do not require such individualized proceedings.[10] The Commission never examined any of these other options, offering instead two conclusory and inadequate "justifications" for its rule.

a. *The Commission's Assertion of "Insignificant" Savings Is Inadequate*

The Commission's first "justification" referred to the rule's effects on utility ratepayers. The full text of that justification (at Pet. App. at B-65) was:

> The Commission notes that, in most instances, if part of the savings from cogeneration and small power production were allocated among the utilities' ratepayers, any rate reductions will be insignificant for any individual customer. On the other hand, if these savings are allocated to the relatively small class of qualifying cogenerators and small power

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quiry pertinent to the purchase rates they are to be paid. The Report specified that (Conf. Rept. at 98; emphasis supplied):

> the examination of the level of rates which should apply to the purchase by the utility of the cogenerator's or small power producer's power should not be burdened by the same examination as are utility rate applications, *but rather in a less burdensome manner.*

However, the Commission has, without cogent explanation, refused to take cogenerator costs into account at all, even though it may well have been able to do so in ways that would be far "less burdensome" than requiring the kind of complex, in-depth study of individual costs undertaken in a utility proceeding (for example, on a generic technology-by-technology basis).

[10] These methods include setting the rate across-the-board at a fixed percentage of avoided cost (such as 80% or 90%), setting rates on a technology-by-technology basis, either at a particular level (not to exceed full avoided cost) or at a fixed percentage of avoided cost, and giving the state commissions a permissible range of percentages of avoided cost which they could apply generically or on some other reasonable basis pursuant to FERC guidelines.

> producers, they may provide a significant incentive for a higher growth rate of these technologies.

This bald claim of "insignificant" savings for "any individual customer" was the Commission's only reference to the rule's impact on the "electric consumers of the electric utility."[11] As the court of appeals explained, it gives no meaning to the "just and reasonable" standard since "*as Congress surely knew . . .* inevitably the impact of FERC's rules per consumer will be less than their impact per cogenerator." Pet. App. at B-11 (emphasis supplied). It simply does not suffice to satisfy the FERC's duty to adopt a rule that is "just and reasonable" to electric consumers.

The Commission never attempted to evaluate the potential savings from specific alternatives to its 100% rule. It did no more than glibly assert that "*in most instances*" rate savings would be "insignificant for any individual customer." Pet. App. at B-65 (emphasis supplied). It did not explain the basis for its refusal to set rates below avoided cost in those *other* instances in which it implicitly concedes savings from such rates might be significant. Further, and most critically, it never explained its reasons for ignoring the potential savings for consumers as a group (or for individual classes of consumers) even though this Court has explicitly held that the Commission has a duty to consider aggregate rate impacts on consumers in establishing just and reasonable rates.[12]

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[11] The Commission never specified what level of savings it deemed "insignificant."

[12] *See FPC v. Texaco Inc.*, 417 U.S. 380, 399 (1974) (holding that the Commission cannot ignore its duty to adopt just and reasonable rates because they "would make a small dent in the consumer's pocket"). As one of the respondents said when asking the FERC to reconsider the rule, the Commission could "[a]s well say that utilities should be permitted to overcharge everyone a little, on the grounds that no one will feel it." Application for Rehearing of American Electric Power Service Corporation. Record at 3552.

The briefs to this Court demonstrate that the claim of "insignificance" is far off the mark.[13] For example, the Natural Resources Defense Council Inc., *et al.* (NRDC), in their brief as *amici curiae*, cite the draft environmental impact statement for the FERC's rulemaking, and Department of Energy and other published studies, to demonstrate the massive potential for cogeneration and small power production—totaling some 25 percent of the nation's current demand for electricity and as much as 40 percent of demand within a few decades. NRDC Br. at 11-12. The expectation of such significant amounts of cogeneration belies the claim that a rule providing for some sharing will produce "insignificant" benefits to consumers, since even a small reduction in purchase rates could lead to substantial savings for consumers if the amount of electricity being sold is large.[14]

b. *The Commission's Claim That Only a Full Avoided Cost Rule Will Encourage All Possible Cogeneration Is Inadequate*

The Commission's second "justification" discussed the effects of alternatives to the full avoided cost rule (Pet. App. at B-66):

> If some fixed percentage is used, a qualifying facility may cease to produce additional units of energy

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[13] As the court of appeals held, "Since the Commission is required by statute to consider the impact of its rate setting on 'electric consumers of the electric utility' it is especially necessary for FERC to demonstrate the factual basis for its conclusion of 'insignificant' savings for them." Pet. App. at B-11.

[14] Thus, a rule that purchase rates equal 80 percent of avoided cost would provide consumer savings of 5 percent where cogeneration accounts for 25 percent of the nation's supply of electricity. The approximate value of this saving—$3.6 billion—was cited by Senator Hart, prior to the enactment of PURPA, as the likely level of rate benefits to be realized by household consumers each year from cogeneration. 123 Cong. Rec. 32419 (1977).

> when its costs exceed the price to be paid by the utility. If this occurs, the utility will be forced to operate generating units which either are less efficient than those which would have been used by the qualifying facility, or which consume fossil fuel rather than the alternative fuel which would have been consumed by the qualifying facility had the price been set at full avoided costs.

The Commission's point, as recognized by the court below, is that since a rule which permits rates below full avoided cost "might be insufficient to encourage the last kilowatt hour of cogeneration," that "justifies shutting the utility's customers out of any share of the benefits." [15] Pet. App. at B-12. This explanation constitutes a direct rejection of the duty to apply the "just and reasonable" standard.

The Commission relies on the assumption that, all other things being equal, the payment of full avoided cost *may* encourage more cogeneration than would payment at a lesser rate.[16] By so doing the Commission deprives section 210(b) of any meaning. If Congress believed that the possibility that a 100% rule *might* encourage additional cogeneration was sufficient to justify such a rate, it could have prescribed a 100% rate by statute. But, by enacting section 210(b), Congress was not determined (as is the Commission) to bring forth "the last kilowatt hour of cogeneration," regardless of the effects thereof on rate-

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[15] By its terms the Commission's point applies only where a fixed percentage rate is used. It does not apply to a rule that would permit the States to set rates at full avoided costs for those cogenerators that require payment at that level, but at lower rates for other facilities.

[16] In fact, the Commission never concluded that a rate below 100% of avoided cost (e.g., 90%) would fail to encourage as much cogeneration as the higher rate, simply noting that *if* such a rate were insufficient for some cogenerators, a 100% rate *might* suffice.

payers. Instead, it sought to "encourage cogeneration" *by removing the obstacles* that impeded its development (*i.e.*, the claimed unwillingness of utilities to buy cogenerated power at a fair price), in a way that recognized the interest in capturing potential rate savings for electric consumers, through rates at "the lower of" full avoided cost and rates which satisfied the criteria specified in section 210(b).[17] By contrast, the Commission's interpretation eliminates any purpose for the inclusion of these criteria in the Act.[18]

Notably, the Commission did not even purport to consider the extent to which alternatives to the full avoided cost rule would induce cogeneration, or to estimate the rate savings that alternatives could provide to consumers. Nor did it consider the extent to which a full avoided cost rule might provide many qualifying facilities with windfall profits at the expense of electric ratepayers.[19] In short, the FERC's justification is nothing more than what the court of appeals described as a "bare, unquantified possibility" (Pet. App. B-12) and as such cannot stand.

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[17] While section 210(b) specifies that rates be "just and reasonable" to consumers, its only direct reference to the interests of cogenerators is that purchase rates not discriminate against them.

[18] The Commission's approach here is much like OHSA's—that exposure to 1 ppm of benzene is necessarily safer than exposure to higher levels and that this assumption justifies failing to apply countervailing statutory factors—which this Court found wanting in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 634, 639-40 (1980).

[19] The Commission permits payment at rates below full avoided cost to cogenerators which antedated PURPA. 18 C.F.R. § 292.304 (b)(3). In so doing, the Commission recognized that rates at full avoided cost may be too high, providing windfall gains to some cogenerators at the expense of utility consumers. This same potential exists in the case of new facilities, yet the Commission took no account of it in promulgating the rule.

2. *The Commission's Justifications for the Rule, First Offered in Appellate Briefs, Are Mistaken*

a. *The Petitioners Misapply the Concept of the "Zone of Reasonableness"*

In its brief, the FERC offers a justification which was not advanced when the rule was adopted, arguing that, since "Congress clearly contemplated that a full avoided cost rate would be within [a zone of reasonableness], albeit at the upper end," this Court may not set aside the rule. (FERC Br. at 18-19, citing *Permian Basin Area Rate Cases*, 390 U.S. at 767).

The argument is premised on an erroneous assumption: Congress did not determine what the "zone of reasonableness" is, and did not equate the full avoided cost limitation with rates that are within that zone.[20] Rather, it established in section 210(b) the criteria for the Commission to employ—the factors to be balanced—in deciding where the zone of reasonableness for purchase rates will lie. Until the Commission engages in the balancing of interests which the statute requires, it cannot determine whether a full avoided cost rule sets rates within that zone.

b. *The FERC Errs in Arguing that the "Just and Reasonable" and "Public Interest" Standards Are Interchangeable*

The FERC argues, again as a new justification, that "[t]he terms 'in the public interest' and 'just and reasonable' are interchangeable." For this the Commission cites *United Gas Pipe Line Co. v. Mobile Gas Service*

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[20] Instead, it selected a statutory structure that expressly contemplates that while a full avoided cost rate *may* be within the zone, it also may exceed what is "just and reasonable" to utility consumers and therefore be outside the zone. Where the latter is the case, the lower of the two rates is to apply. *See* Conf. Rep. at 98 (quoted *supra* at 10-11).

Corp., 350 U.S. 332, 345 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956). The suggestion seems to be that a purchase rate rule that meets the FERC's view of the "public interest" (which is to encourage cogeneration to the maximum feasible extent) necessarily satisfies the "just and reasonable" standard, regardless of the effect of the rule on the rates of utility consumers. (FERC Br. at 18 n.20).[21] Such a suggestion would deprive the "just and reasonable" standard of independent content, notwithstanding its specific and separate delineation in section 210(b).

Contrary to the contention, the cited decisions do *not* use the terms interchangeably. Rather, they hold that "public interest" factors will be considered within the scope of the terms "just and reasonable" in statutory provisions which, unlike section 210(b), do not contain any independent "public interest" standard. They do not question that the term "just and reasonable" in a federal power rate statute carries the definite, well understood rate-related meaning that it carried before, and has continued to carry since those cases were decided.[22]

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[21] The Commission's point, first raised in its brief to this Court, is a post-hoc rationalization of appellate counsel which cannot substitute for the Commission's interpretation of the statute at the time it promulgated the rule. *See Investment Company Institute v. Camp*, 401 U.S. 617, 627-28 (1971).

[22] *See* pages 8-10, *supra*. The focus of "just and reasonable" is precisely on what the FERC calls "the narrow questions" of "lower rates to consumers." (FERC Br. at 19 n.20) By specifying in § 210(b) that purchase rates be "just and reasonable *to the electric consumers of the electric utility*" (emphasis supplied), Congress made clear its intention to use the standard consistent with its traditional meaning and not to permit the Commission (and certainly not its appellate counsel) to dismiss the possibility of rate savings to consumers as a matter of little moment.

C. Under the Governing Standards of Judicial Review, the Avoided Cost Rule Should Be Vacated and Remanded to the Commission

1. *The Commission Has Failed to Demonstrate Any Basis for Deferring to Its Construction of Section 210(b) of PURPA*

An agency's construction of a statute is entitled to deference, and is not to be overturned if it is " 'sufficiently reasonable' to be accepted by a reviewing court." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981). However, as Justice Jackson expressed the matter in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944):

> The weight of [agency] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Further, as this Court stated in *Democratic Senatorial Campaign Committee*, 454 U.S. at 32 (emphasis supplied):

> [T]he courts are the final authorities on issues of statutory construction. They *must reject* administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement.

The Commission has failed to demonstrate any convincing basis which justifies deference to its interpretation of section 210(b). Even though its purchase rate rule departs sharply from the traditional meaning of the "just and reasonable" standard, and fails to capture any share of the cost savings for ratepayers, the Commission never attempted to offer a coherent justification for the rule in light of the statutory standard.[23] In its brief to this

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[23] *See, e.g., Investment Company Institute v. Camp*, 401 U.S. 617 (1971).

Court, the FERC still fails to offer any explanation that withstands scrutiny when measured against the requirements of the statute.[24]

The premise of each of the Commission's justifications for the rule is that section 210 gives it unfettered discretion to ignore express statutory requirements if it believes that doing so would "encourage cogeneration." The FERC thereby reads the "just and reasonable to the electric consumers" standard as imposing no duty upon it other than to ascertain that its rule not exceed the full avoided cost ceiling. However, when Congress enacted section 210(b)'s rate criteria, it made evident that the statute is not a "blank check" to encourage cogeneration, regardless of other interests. Instead, it required the Commission to give meaning to the "just and reasonable" criterion, by considering "the hard questions which the standard necessarily raises" (Pet. App. at B-10), and to take account of the interests of consumers in rate savings when engaging in the balancing of countervailing interests the statute demands.[25]

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[24] *See International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 565-66 (1979). The FERC's contention that Judge Wilkey's opinion for the court of appeals represents a "marked departure" from "traditional standards" of judicial review seriously mischaracterizes the decision below, which recognized the court's obligation to give deference to the FERC's construction of the statute, but found that the FERC had failed to offer any convincing explanation of how its rule could be squared with the statutory requirements. Pet. App. at B-9, 18.

[25] Diamond Shamrock Corporation *et al.* (Diamond Shamrock) share the FERC's conclusion that the "just and reasonable" standard has no meaning independent of the full avoided cost limitation, but reach this conclusion more directly. These companies say expressly that § 210(b) requires only that purchase rates cause no harm to utility consumers, *i.e.*, that the standard requires no more than that "utilities pay not a penny more" than the full avoided cost. Br. at 24. They dismiss the notion that the statute imposes upon the Commission the duty to balance the interests of cogenerators, ratepayers and the public as "pure invention" (*id.* at 21) and

The FERC argues nonetheless that deference to its construction of section 210(b) is "particularly appropriate" since its interpretation represents "a contemporaneous construction of a statute by the men charged with setting its machinery in motion . . ." (FERC Br. at 20-21 quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). But the "contemporaneous construction" principle does not shield an interpretation from review, serving as "only one input in the interpretation equation." *Zuber v. Allen*, 396 U.S. 168, 192 (1969) (Harlan, J.). A contemporaneous construction is only to be sustained if it is consistent with the mandate of the statute and with Congressional intent.[26]

The basis for deferring to the FERC's construction in this case is particularly weak. Nothing in the legislative history suggests that Congress had any reason to suspect that the FERC would interpret section 210(b) in the present manner, and the effect of the FERC's interpretation is to eliminate any purpose for including section 210(b)'s rate criteria in the Act. Consequently, the FERC's construction of the statute may not be sustained.

2. *In Promulgating the Rule, the Commission Not Only Misinterpreted the Statute, But Also Failed To Engage in Reasoned Decisionmaking And Acted in an Arbitrary and Capricious Manner*

The Commission focuses much of its argument on its claim that the court of appeals misunderstood the appropriate standard of review and applied the substantial evidence test. This mistaken assertion is drawn from the court's footnote citation of *Public Systems v. FERC*, 606 F.2d 973 (D.C. Cir. 1979).[27] However, the court of ap-

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admit in this regard, that "the Commission did not follow this far-ranging and highly unstructured procedure" (*id.* at 23).

[26] *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979); *Zuber v. Allen*, 396 U.S. at 192-93.

[27] Likewise, the statement to this effect by Judge Wald and Judge Mikva, in dissenting from the decision denying rehearing *en banc*, Pet. App. at B-207 n.2, merely refers to this footnote without explanation.

peals never purported to employ the substantial evidence test in its decision and cited *Public Systems* only to support the proposition that the FERC has an obligation to engage in reasoned decisionmaking (Pet. App. at B-12)[28] —an obligation which applies with equal force regardless of the standard of review.

In fact, although the court of appeals did *not* misapply the standard, the FERC's characterization of the decision of the court below is irrelevant since application of the proper standard of review requires that the rule be reversed. The FERC's principal failing is that it did not offer an adequate explanation of how the rule satisfied the statute's express requirements. Informal rulemaking never was intended to give administrative agencies license to ignore statutory requirements. Whatever the applicable standard of review—whether under the substantial evidence test, or 5 U.S.C. § 706(2)(A), directing reversal of agency action that is "arbitrary and capricious" or "not in accordance with law"—agency decisions must be consistent with statutory mandates. Since the FERC failed properly to construe the statutory requirement that its rule be "just and reasonable to the electric consumers," it cannot be upheld.

Further, even if the only issue on review were whether the Commission's decision was arbitrary and capricious, the rule could not be sustained. The essence of an agency's obligation under the arbitrary and capricious test is to consider all of the relevant factors—that is, to engage in a "rational weighing of competing policies." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (each case applying

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[28] Although *Public Systems* did apply the substantial evidence test (because the rule was an order pertaining to rates under the Federal Power Act), the opinion noted that the requirement of reasoned decisionmaking applies with equal force where the standard of review is "arbitrary and capricious." *See* 606 F.2d at 980 n.34.

an arbitrary and capricious standard of review).[29] The FERC's duty not to produce an "arbitrary result," *Permian Basin Area Rate Cases*, 390 U.S. at 790, compels it to give "reasoned consideration to each of the pertinent factors," *id.* at 792 (which that opinion describes as "the various interests which Congress has required it to reconcile," *id.* at 770).

The purpose of including the section 210(b) rate criteria in PURPA, rather than mandating a full avoided cost rule by statute, was to attempt to capture potential rate savings for consumers, if that could be done in a manner which is in the public interest and does not discriminate against cogenerators. In order to determine if this could be accomplished, the Commission was required to examine carefully the possibility of adopting a purchase rate rule that set rates *below* the statutory maximum of full avoided cost. As we have shown, the Commission failed to do this; it failed to make any effort to consider seriously alternatives to full avoided cost, or to consider the effects upon consumer rates and upon cogenerators that alternative rules might provide. It thereby failed to discharge its duty to base its rule "on consideration of the relevant factors." *FCC v. National*

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[29] As this Court held in *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947), review under the arbitrary and capricious standard requires an agency to offer a reasoned explanation in order to provide the court with a basis for review:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." (citation omitted).

Citizens Committee for Broadcasting, 436 U.S. at 803.[30] As such its action was arbitrary and capricious.

3. *Remanding the Full Avoided Cost Rule Will Neither Impose Unreasonable Burdens Upon the Commission Nor Require that It Undertake Adjudicatory Hearings*

The Commission erroneously argues that remand is inappropriate since the court of appeals violated the constraints on judicial interference with agency procedures which this Court articulated in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). FERC Br. at 31-32. The Commission offers two arguments in this regard.

First, it suggests that the court of appeals decision requires the Commission to undertake full adjudicatory hearings. However—unlike the appellate court's original decision in *Vermont Yankee*—the decision below leaves the procedures to be followed on remand entirely to the Commission, without any basis for inferring that extraordinary procedures are contemplated or required.[31]

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[30] Petitioner American Paper Institute, Inc. (API) would excuse the Commission's "justifications" because, it argues, the Administrative Procedure Act (APA) requires only a "concise general statement of the basis and purpose" of a rule. 5 U.S.C. § 553(c). API Br. at 13. But, the APA does not excuse the FERC from explaining how its action satisfies statutory requirements and from providing a basis for its principal findings. *Chenery*, 332 U.S. at 196-97; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). *See also Permian Basin Area Rate Cases*, 390 U.S. at 814; *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 701 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975) ("a thorough and comprehensible statement of the reasons" for an agency decision is especially advisable where there has not been an evidentiary hearing).

[31] The FERC's contention that to sustain its rule under the decision below would require it to undertake an exhaustive analysis of the costs of "every sort of cogeneration and small power production

The Commission's second argument is that remand is inappropriate because *the court* "did not indicate how the Commission could better support in a rulemaking record any particular percentage of avoided cost other than 100%." This contention misconstrues the appropriate relationship between administrative agencies and the courts. The court's task is to review the legality of the agency's action, not to specify how the agency should conduct the remanded proceeding. Once the court of appeals decided, correctly, that the FERC failed to apply the statutory criteria properly, the responsibility passed to the agency to determine (subject to any further judicial review) what sort of factual inquiry the statute commands.

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technology" (FERC Br. at 30-31 n.33) suffers from three fatal flaws.

First, the Commission has not yet made any determination that examination of the generic costs of various cogeneration technologies is infeasible or would unduly restrict the success of the program. Counsel's post-hoc rationalizations cannot substitute for a finding the FERC never has made. See note 21, *supra*.

Second, there is good cause to believe that the FERC could undertake an analysis of costs on a generic technology-by-technology basis without undue burden. Published reports indicate that relatively few industries (e.g., paper, steel, chemicals) account for a substantial percentage of the cogeneration potential, and there is data available concerning the costs of cogeneration for some or all of these industries. *See, e.g.*, Resource Planning Associates, *The Potential for Cogeneration Development in Six Major Industries by 1985* (1977).

Third, even if the Commission determines that it is infeasible to consider costs, there are alternatives to full avoided cost which would provide rate savings to consumers (e.g., a rule setting rates at a specified percentage of avoided cost). Estimates of the amount of potential cogeneration (*see, e.g.*, API Br. at 19-20; NRDC Br. at 11-12), provide a useful basis for estimating the potential savings to ratepayers under such rates.

The FERC's claim that the rule should be sustained under two of this Court's "predictive judgment" cases, FERC Br. at 31, is likewise based on a misunderstanding of its statutory responsibility. These cases hold that "complete factual support in the record is not . . . possible or required" in rulemaking proceedings which require a predictive judgment based upon agency expertise.[32] In each case, the agency had properly interpreted the governing statutory criteria and made a good faith effort to apply those criteria on the basis of available facts. Because the issues to be evaluated required forecasts of future conduct and were not readily susceptible to quantitative analysis (*e.g.*, in *WNCN*, the effect of a possible change in the FCC's rule on diversity in programming), the agencies were allowed to rely upon "expert judgment" in applying the available facts to the predictive judgments they were called upon to make. However, those cases do not excuse an agency which, like the FERC here, has failed to attempt to apply available data to the statutory criteria or to explain how its action comported with those criteria.

D. The Decision of the Court of Appeals was Narrow and Confined, and Did Not Substitute the Court's Judgment for that of the FERC

1. *The Court of Appeals Left the Responsibility to Balance Competing Interests to the FERC*

The Commission repeatedly attempts to characterize the decision below as precluding it, as a matter of law, from adopting a rate equal to full avoided costs.[33] Based upon this contention, the Commission accuses the court of

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[32] *FCC v. WNCN Listeners Guild*, 450 U.S. at 594-95; *FPC v. Transcontinental Gas Pipeline Co.*, 365 U.S. 1, 28-29 (1961).

[33] *See, e.g.*, FERC Br. at 17-18. The FERC would have this Court "pierce the literal language" of the court's decision in order to determine that the court of appeals did not really mean what it said.

appeals of improperly "substitut[ing] its view of public policy for that of the Commission."[34] Yet, in its original opinion, and again on rehearing, the court of appeals expressly confined its holding to the Commission's failure to justify its decision, and emphasized that the Commission could have adopted a full avoided cost rule, if it were based upon appropriate analysis and findings.[35]

The Commission also objects with misplaced vehemence to the following statement of the court of appeals (found at Pet. App. B-12):

> [the Commission] should allocate the benefits more evenly between the cogenerators and the utilities if the utilities can demonstrate that, under a percentage of avoided cost approach, an allocation less heavily favoring the cogenerators is in the public interest and the interest of the utilities' electric consumers, and will not disproportionately discourage cogeneration.

The statement only confirms that the court of appeals recognized that the judgments to be exercised in the statutory balancing of interests were for the Commission, and not for the court. The court's paraphrase of the statutory test directs the Commission to evaluate consumer interests, other public interest considerations and effects on cogenerators, and to make a good faith effort to strike an appropriate balance among these potentially competing interests. As the court made clear, it is for the Commission to make the judgmental determinations necessary to apply the statutory criteria. The statute demands no less.

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[34] FERC Br. at 16, also at 17 & n.17, 21, 32. Far from substituting its judgment for that of the Commission, the court of appeals upheld two of the four Commission rules challenged before it, giving "a great deal of deference" to the FERC's construction of statutory terms. (Pet. App. at B-19).

[35] *See* Pet. App. at B-9, 10, 16, 203-04. *See* pages 4-5, *supra*.

2. *The Court of Appeals Did Not Misunderstand the Basis or the Effects of the Rule*

The Commission and its supporters devote large portions of their briefs to an attempt to show that the court of appeals misunderstood the basis and effects of the full avoided cost rule, in order to support their claims that the court substituted its judgment for that of the Commission.[36] At most, these arguments are tangential since the question before this Court is whether the FERC acted lawfully in promulgating the rule. However, these arguments, even though not germane, are mistaken; the court below did not misunderstand either the rule or its effects.[37]

State Commission Application for Waivers of the Rule

The Commission claims that the court below failed to take account of the provision of the regulations that permits state commissions to apply to the FERC for a waiver of the full avoided cost rule. FERC Br. at 22. But this waiver provision is quite limited. It is available

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[36] These arguments are advanced not as positive reasons for sustaining the rule, but rather only to show that the court of appeals allegedly substituted its judgment for that of the Commission. Had they been offered as rationales for the rule, they could not sustain it since the Commission did not mention them in justifying the rule. As such, they are merely post-hoc rationalizations of counsel which are not a substitute for action of the agency itself. *See, e.g., Investment Company Institute v. Camp*, 401 U.S. 617, 627-28 (1971); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

[37] NRDC *et al.*, reflect their misunderstanding of the rule when they cite the provision of the rule not requiring full avoided cost rates for facilities that antedated PURPA for their mistaken view that the avoided cost rule applying to all "new" cogenerators is "more a guideline than a specific rate" by which state commissions are given broad power to set rates below full avoided cost. NRDC Br. at 7 & n.8. The FERC's treatment of these "pre-existing" cogenerators has no bearing upon the legality of the purchase rate rule for new facilities.

only to state commissions, and not to utilities or ratepayers,[38] and the state commissions may apply only after issuing a public notice in the utility's service area. The provision does not dispense with the presumption in favor of the rule, but rather provides that a waiver will be granted only if the state commission demonstrates that, in the circumstances, a full avoided cost rate "is not necessary to encourage cogeneration and small power production and is not otherwise required under section 210 of PURPA," 18 C.F.R. § 292.403. State commissions are not likely to undertake the burden of seeking such a waiver frequently[39] (and API points out that no application for waiver of the full avoided cost rule has heretofore been sought).[40]

The Parties' Ability to Negotiate Rates Below Full Avoided Cost

The Commission observes that under its rules, "qualifying facilities *may* negotiate contract prices that are

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[38] This distinguishes the FERC's limited waiver from the procedures referred to in the "safety valve" cases cited by API. Those procedures (which the Court characterized in the *Permian Basin Area Rate Cases*, 390 U.S. at 772 as "broad guarantees of special relief") all permitted the affected party itself to apply for the exception. API cites those cases only to say that such procedures can enhance the validity of an agency's exercise of "*discretion* to proceed in complex areas" API Br. at 25 n.19 (emphasis supplied). But, an agency has no discretion to fail to adhere to statutory commands and cannot excuse such failure because it might, on occasion and after application, choose to abide by its statutory responsibilities in a specific case.

[39] Since PURPA requires the state commissions to follow the FERC's rules, the FERC's determination that full avoided cost rates are required carries a presumptive validity likely to discourage state commissions from evaluating the possibility of rates below full avoided cost for themselves, or from attempting to seek waivers, which they may conclude are unlikely to be granted. This is particularly so since the Commission has invited state commissions to *exceed* the incremental cost ceiling. *See supra* note 6.

[40] API Br. at 23-24, n.16 and 25, n.19.

lower than full avoided cost rate." FERC Br. at 22 (emphasis supplied). However, the question is whether rates *under the rule* are "just and reasonable" to utility ratepayers. That cogenerators may agree voluntarily to forego their rights to be paid full avoided cost is of limited practical benefit, since they can demand payments at that level.[41] In any event, the possibility that a cogenerator may waive a right is no defense to the legality of a rule specifying that right.[42]

The Claim that Ratepayers Will Obtain Long-Range Benefits from a Full Avoided Cost Rule

While some of the briefs suggest that consumers will obtain long-term rate benefits from the full avoided cost rule,[43] the Commission found expressly to the contrary, stating in its Order that "use of the full avoided cost standard will not produce any rate savings to the utility's customers." Pet. App. at B-65 (quoted by the FERC at page 7 of its brief). This finding is compelled, since the rule requires the utility to pay 100% of its avoided costs—stated otherwise, to pay all of the benefits of the transaction—to cogenerators. Even if the availability of cogenerated power permits the utility to avoid or defer construction of new plants or to reduce reliance on expensive peak load facilities, under the FERC's rule, consumers' rates will not be reduced, since the utility will

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[41] The rule specifies that a cogenerator need not negotiate rates below full avoided cost to obtain a long-term rate commitment from the utility, by giving the cogenerator the right to full avoided cost payments not only currently but "over a specified term" once it unilaterally commits to a "legally enforceable obligation" to provide the utility with energy or capacity. *See* 18 C.F.R. § 292.304 (d)(2); Order No. 69, Pet. App. at B-71-73.

[42] API's claims that utilities will take unfair advantage of cogenerators is unwarranted; and, in any event, both the rule and the oversight of utilities conducted by the FERC and the state commissions protect cogenerators should any abuse occur.

[43] *See*, Brief for Kerr-McGee Chemical Corporation *et al.* (Kerr-McGee) at 16-21; NRDC Br. at 17-21.

be required to pay to cogenerators the full measure of the avoided costs.

Futhermore, any claim that ratepayers would enjoy long-term non-rate benefits would not respond to the Commission's duty to consider, under the "just and reasonable" standard, the rate impact of its rule.[44] It is likely that, absent the FERC's rule, many cogenerators would have sold power to utilities at less than full avoided cost. Indeed, the Commission's treatment of pre-PURPA cogenerators demonstrates the Commission's recognition that cogenerators do not necessarily require payment of full avoided cost in order to operate.[45] 18 C.F.R. § 292.304 (b)(3). By requiring the payment of full avoided cost to every new cogeneration facility (including the many that would have been installed at purchase rates set at less than full avoided cost), the FERC's rule deprives utility consumers of benefits they would have reaped but for PURPA.[46]

The Court of Appeals' Discussion of Market Forces

The Commission devotes several pages of its brief to the court of appeals' discussion of market forces, includ-

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[44] Reference to the benefits of oil and gas savings, for example, is ironic since the Commission did not consider alternative purchase rate rules that would have avoided unduly encouraging oil- and gas-fired cogeneration where such cogeneration would increase overall use of such fuels.

[45] The FERC's claim that a full avoided cost rate "duplicates the context" of a free market is mistaken. In a competitive market, the price will be in equilibrium between *both* the utilities' and the cogenerators' marginal costs. In such a market, it is doubtful that any party would agree to an arrangement which conferred all of the benefits of the transaction upon the other party.

[46] The rule's adverse effects on utility consumers are exacerbated by the "simultaneous transaction" rule, which requires the utility to pay the cogenerator at full avoided cost for power which the utility does not receive or use.

ing references to the subject of monopsony power, which appears at the end of the full avoided cost part of its opinion. *See* FERC Br. at 24-27. Yet, the court expressly recognized that these remarks were only *dicta*, characterizing them at the outset as "some additional concerns raised by the full avoided cost rule," mentioned only in the context of the remanded rulemaking. Pet. App. at B-12. As the court specified in denying rehearing, these concerns were only "suggested considerations" for the Commission on remand which the court realized "may indeed have ready answers" that "should not be burdensome for FERC to supply." Pet. App. at B-204. These remarks, the court explained (Pet. App. at B-16), did not affect its holding, for

> even if utilities are monopsonists, it does not necessarily follow that the proper rate is at full avoided cost. Again, the Commission must explain why the level was set here rather than somewhere else.

II. THE INTERCONNECTION RULE IS UNLAWFUL

An "interconnection" is a physical connection allowing electricity to flow from one entity to another and is required to enable a cogenerator to sell electricity to a utility.[47] Congress recognized this and, in sections 202 and 204 of PURPA, added sections 210 and 212 to the Federal Power Act, authorizing the FERC, *inter alia*, to order interconnections between cogenerators and utilities if certain conditions are met, including those to protect the safety and reliability of the electric transmission network. Congress further specified, in PURPA section 210(e)(3)(B), that the FERC may *not* exempt qualify-

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[47] The only interconnections at issue are those necessary to enable a qualifying facility to transfer electricity *to a utility*. *See* Pet. App. at B-20; pp. 41-43, *infra*. Because these involve adding electricity to the network of utility grids, they have the potential to cause technical difficulties affecting safety and reliability. Standard interconnections to enable utilities to transfer power *to cogenerators* do not cause these kinds of difficulties and are not in dispute.

ing facilities from the provisions of these newly added sections of the FPA.

The FERC, relying on its authority to issue rules "necessary to encourage cogeneration" under section 210(a) of PURPA, has directed utilities, on a blanket basis, "to make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under [the FERC's cogeneration rules]." 18 C.F.R. § 292.303(c)(1). The court of appeals found that this rule exempted cogenerators from the specific conditions imposed by FPA sections 210 and 212, contrary to the prohibition against such an exemption contained in section 210(e)(3)(B) of PURPA.

The FERC argues that this decision by the court of appeals, like its decision vacating the full avoided cost rule, is based on a misperception of the statutory scheme and that the effect would be to "paralyze" the cogeneration program. FERC Br. at 35, 43. Neither contention is valid. The Commission's argument that section 210(a) of PURPA provides an independent basis for ordering interconnections ignores the plain language of the statute and the legislative history, both of which confirm that Congress intended to deal with cogeneration interconnections through the comprehensive authority of FPA sections 210 and 212. The argument that compliance with these provisions will prejudice the cogeneration program is unfounded and, in any event, is not a sufficient basis for a rule which conflicts with the express terms of the statute.

A. The Rule Would Exempt Qualifying Facilities From the Requirements of Section 210 of the Federal Power Act, Contrary to the Explicit Statutory Limitation Contained in Section 210(e)(3)(B) of PURPA

In resolving issues of statutory construction, the starting point is the language of the statute. *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979).

Here, the pertinent sections of PURPA (including sections 202 and 204 which added sections 210 and 212 of the FPA) indicate plainly that Congress intended to deal with interconnection for cogenerators under section 210 of the FPA.

FPA section 210(a)(1), 16 U.S.C. § 824i(a)(1) (Supp. V), expressly authorizes the Commission to issue an order that a utility interconnect with a qualifying facility "Upon application of any . . . qualifying cogenerator, or qualifying small power producer." Once the FERC receives an application for an interconnection order, it is to "afford an opportunity for an evidentiary hearing" and determine whether specified substantive standards are met.[48]

PURPA section 210 confirms Congress' intent to rely upon FPA section 210 to provide cogenerators with the means to obtain necessary interconnection orders. Thus, while PURPA section 210(e) authorizes the FERC to exempt qualifying facilities from provisions of the FPA, section 210(e)(3)(B) expressly precludes the Commission from exempting them from "the provisions of sections 210, 211, or 212 of the Federal Power Act or the necessary authorities for enforcement of any such provision under the Federal Power Act."

Against this statutory background, the FERC promulgated rule § 292.303(c)(1), 18 C.F.R. § 292.303(c)(1),

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[48] FPA § 210(b), 16 U.S.C. § 824i(b) (Supp. V). Under FPA § 210(c), 16 U.S.C. § 824i(c) (Supp. V), the FERC is to determine whether the requested interconnection order: (1) is in the public interest; (2) would encourage conservation of energy or capital, optimize the efficiency of the use of facilities and resources, or improve the reliability of any utility system to which the order applies; and (3) meets the requirements of FPA § 212. These requirements include that the order will not: likely result in an uncompensated economic loss by, or place an undue burden on, any party; unreasonably impair any utility's reliability; or impair any utility's ability to render adequate service to its customers. By contrast, the Commission's rules only address the issue of cost. 18 C.F.R. § 292.306.

which exempts cogeneration facilities from the need to comply with the safeguards specified in FPA sections 210 and 212. The rule thereby deprives FPA section 210(a) and PURPA section 210(e)(3)(B) of any meaning. *See, e.g., American Textile Manufacturers Institute*, 452 U.S. at 513. As the court of appeals held, this rule "is inconsistent with the statutes" (Pet. App. at B-22); thus, it must be rejected. *Democratic Senatorial Campaign Committee*, 454 U.S. at 32.

The FERC attempts to overcome the direct conflict between the statute and its rule by arguing (1) that the legislative history demonstrates that sections 210 and 212 of the FPA are addressed to an "entirely distinct" problem, FERC Br. at 37; and (2) that inferring authority to order interconnections under section 210(a) of PURPA is "absolutely essential to make the program work," FERC Br. at 43. We address each of these contentions below, along with other arguments offered to support the rule.

B. The Legislative History Establishes that Congress Chose FPA Section 210 As the Means to Provide for Interconnections of Qualifying Facilities

1. *Contemporaneous Constructions of the Legislative Language Demonstrate That Congress So Understood FPA Section 210*

While it ordinarily is unnecessary to rely upon legislative history where the meaning of the statutory language is clear, *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980),[49] since the Commission's principal defense of its rule is based upon its misreading of the legislative history, we now turn to that subject. There is no dispute that Congress intended there to be a means to compel a utility to interconnect with a cogenerator in appropriate cases. The

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[49] *See Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614 & n.33 (1981).

clear and direct statements in the legislative history show that FPA section 210 was intended to be that means. The bill proposed by the Administration,[50] like the final version of PURPA, contained a comprehensive provision dealing with interconnection, which required evidentiary hearings, and explicitly applied to cogenerators. This provision (section 521[51]), which became FPA section 210, was separate from the provision dealing with cogeneration (section 522) which did not mention interconnections. In describing this bill to Congress, the drafters explicitly stated that qualifying facilities would obtain any necessary interconnection through section 521, rather than through section 522, the cogeneration provision that was the precursor to PURPA section 210.

Thus, David Bardin, Deputy Administrator of the Federal Energy Administration and a principal spokesman on behalf of the Administration bill, stated that the bill provided "*the Federal Power Commission* comprehensive authority to require interconnection between utilities and cogenerators. . . ."[52] Mr. Bardin's reference to the Commission makes it unmistakable that he was referring to the bill's interconnection provision, section 521, rather

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[50] H.R. 6831 (May 2, 1977) and S. 1469 (May 5, 1977).

[51] Section 521 provided in pertinent part:

> (b)(1) Whenever the Commission, on its own motion, or upon application of any State commission or of any electric utility or any qualifying cogenerator . . . and after notice . . . and after evidentiary hearing, finds such action necessary or appropriate in the public interest, it shall by order direct an electric utility . . .
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> > (A) to establish physical connection of its transmission facilities with the facilities of any other electric utility or qualifying cogenerator. . . .

[52] *Public Utility Rate Proposals of President Carter's Energy Program: Hearings on S. 122, S. 1300, S. 1363, S. 1364, S. 1469 (Part E) Before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources*, 95th Cong., 1st Sess., (Senate Hearings) Pt. 1, at 187.

than to its cogeneration provision, section 522, since section 522 required the Federal Energy Administration (FEA), rather than the Federal Power Commission (FPC), to promulgate rules "requiring electric utilities to offer to sell electric energy to any qualifying cogenerator and to offer to purchase electric energy from such cogenerators." Mr. Bardin's testimony describing the bill to the House subcommittee likewise made clear that section 521 (which became FPA 210) was the means for ordering interconnections between cogenerators and utilities to effectuate the cogeneration provision of section 522 (which became PURPA section 210):

> Further, the bill would provide general comprehensive authority for the Federal Power Commission to order interconnection. . . .
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> . . .
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> The bill further would provide authority for the Administrator of FEA to insure that utilities buy and sell electricity at non-discriminatory rates to industries that could generate electricity *and provide authority to the Federal Power Commission to order utilities to allow such industries to interconnect with the utility system*. . . .[53]

The Congressional Office of Technology Assessment prepared an *Analysis of the Proposed National Energy Plan, August 1977*. That *Analysis* demonstrates that Congress understood the Administration bill to address in section 521 the cogeneration interconnections required to effectuate the purchases and sales authorized by section 522 (*id.* at 129; emphasis supplied):

> The proposed legislation contains a number of features which either remove obstacles to or provide incentives for the practice of cogeneration by industry. Sec. 521 enables any qualifying cogenerator to

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[53] *Hearings on H.R. 6831, et al. Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (House Hearings), Part 3, vol. 1, at 74 (1977) (emphasis supplied).

> intertie with utility transmission facilities in order to sell surplus power and buy backup power at fair prices. In Sec. 522, qualifying cogenerators are assured fair rates *in the above transactions*. . . .

During markup, the House Committee essentially substituted the provisions of H.R. 6660 for those of the Administration bill dealing with interconnection and cogeneration. Those provisions were quite similar to those of the Administration bill concerning interconnection, with two exceptions. First, this House bill directed the FPC, and not the FEA, to prescribe purchase and sale rules; and, second, it required these rules to include "rules respecting the interconnection of a qualifying cogeneration facility to the distribution system of any electric utility or to a centrally dispatched power pool. . . ."[84] H.R. 6660, § 101(b) (April 26, 1977); Committee Print, June 28, 1977 (J. 91-845), § 546(a)(2). (This version of the bill became known as H.R. 8444 (July 20, 1977)).

Even after the provisions of this bill were largely substituted for those of the original Administration bill, the legislative history demonstrates that Congress understood the precursor to FPA section 210 (H.R. 8444, § 541) to be the mechanism for providing interconnections for cogenerators whose purchases and sales were the subject of that bill's section 546, its precursor to PURPA section 210. For example, the Chairman of the FERC testified before a House Subcommittee concerning section 541:

> Enactment of H.R. 8444 would represent an important step in providing the Commission with the legislative mandate and the necessary authority to carry out the responsibility for assuring adequate, reliable bulk power supply. Three sections of this Bill are especially important in this regard: Sections 541, 542, and 545.

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[84] The language referring to interconnections with distribution systems was removed from the cogeneration provision by the Conference Committee, thus returning the material language to the form it took in the Administration bill. See pages 41-43, *infra*.

> Section 541 extends the authority of the Commission under Section 202(b) of the Federal Power Act in six ways:
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> > . . . (3) The Commission would be empowered to act upon application of any qualified cogenerator. This provision recognizes the need to encourage cost-effective cogeneration and constitutes an important step in removing obstacles to such expanded cogeneration.[55]

2. *The Action of the Conference Committee Confirms the Illegality of the Commission's Rule*

While the Conference adopted much of the House version of the interconnection and cogeneration portions of the legislation (FERC Br. at 44), it did make two pertinent changes. First, the Conference deleted that part of what became PURPA section 210 which would have directed the Commission to promulgate rules respecting interconnection with "distribution facilities" of an electric utility.

The Commission argues that this deletion of the reference to interconnection in PURPA section 210's precursor demonstrates that PURPA section 210 nonetheless grants the Commission implied authority to order interconnections thereunder because "Congress viewed the obligation to interconnect as subsumed within the obligation to purchase and sell, which was retained. . . ." FERC Br. at 44. The Commission's contention is unfounded.

As the court of appeals noted, "[t]he interconnections at issue here are not the usual ones by which a customer

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[55] *Hearing on the New York City Blackout of July 13, 1977 Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (Blackout Hearing) at 162, 165 (1977) (statement of Charles Curtis). The Subcommittee used the hearing as a vehicle to undertake a thorough review of the interconnection provisions of the pending legislation. *See also* House Hearings at 601 (Response to subcommittee questions furnished by the FPC).

takes power *from* a utility but rather those which permit a cogenerator to transmit electricity *to* a utility." Pet. App. at B-20 (emphasis in original). The "usual" kind of interconnection by which a customer takes electricity from a utility involves the *distribution* facilities of the utility. By contrast, the interconnections at issue under the Commission's rule involve those necessary to permit cogenerators to *transmit power to* an electric utility. Such interconnections are with the *transmission* facilities of the electric utility.[66]

FPA section 210 and all its precursors uniformly related to interconnections with the *transmission* facilities of electric utilities—that is, with the type of interconnection at issue here. The only reference to interconnections in the precursor to PURPA section 210 was the pre-Conference direction in the House bill that the rules under that section encompass interconnections with the *distribution* facilities of utilities—that is, interconnections to enable utilities to sell power to cogenerators, and not the interconnections necessary to enable cogenerators to sell to utilities that were always the subject of FPA

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[66] The Commission's own regulations define the term "transmission system" to mean:

> . . .
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> (3) All lines and equipment whose primary purpose is to augment, integrate or tie together the sources of power supply.

18 C.F.R. Part 101, Electric Plant Instruction No. 14(A). Since the lines and equipment whose primary purpose is to bring additional electricity *into* the utility system "augment . . . the sources of power supply," they are "transmission facilities." Instruction No. 14(B) defines the term "distribution system" to mean "all land, structures, conversion equipment, lines, line transformers, and other facilities employed between the primary source of supply (i.e., generating station, or point of receipt in the case of purchased power) and of delivery to customers, *which are not includible in transmission system, as defined in paragraph A. . . .*" (emphasis supplied).

section 210. Thus, even if the Conferees' deletion of the "distribution facilities" interconnection language could reasonably be inferred to have left authority over such interconnections in place under PURPA section 210, that authority is confined to "usual" interconnections that are not the subject of the present dispute.[57]

Second, the Conference took one other significant action. It added, in section 210(e)(3)(B), the express prohibition against exempting qualifying cogenerators from FPA sections 210 and 212. By adding the non-exemption provision at the same time that it deleted all reference to interconnections of any kind from PURPA section 210, Congress re-confirmed its intent that FPA sections 210 and 212 were to be the means to assure necessary interconnections between cogenerators and utilities while protecting the safety and reliability of the utility system.

C. The Constructions Urged by Petitioners Do Not Survive Examination

The Commission contends that it has authority, independent of FPA sections 210 and 212, to order interconnection under section 210(a) of PURPA. The Commission's argument is that, since interconnections are necessary for cogenerators to sell to utilities, and since PURPA section 210(a) directs it to promulgate purchase and sale rules "necessary to encourage cogeneration," that section must permit it to override the FPA sections (and to do so in spite of PURPA section 210(e)(3)(B)'s express limitation upon its exemption authority).

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[57] In fact, such an inference would seem improper. As it came to Conference, § 546 of H.R. 8444 enumerated five subjects to be included in the Commission's cogeneration rules, of which two (including interconnections with distribution facilities) were deleted. *Compare* H.R. 8444, § 546(a)(3)-(5) *with* PURPA § 210(a). To draw the inference suggested by the FERC requires the assumption that Congress meant to leave the Commission's authority over these five areas unchanged, even though it went to the trouble of deleting two while leaving the other three in place. FERC Br. at 44.

The Commission cites no authority for this claim that section 210(a) authorizes interconnections. It is premised on the FERC's misreading of the legislative history and its belief that PURPA section 210 and FPA sections 210 and 212 address "entirely distinct" matters. FERC Br. at 37. As we have shown, however, Congress provided comprehensive interconnection authority in the FPA sections it enacted as part of PURPA, and Congress intended those provisions to provide the means for cogenerators to obtain necessary interconnections. It would be utterly inconsistent with the structure of the statute to imply independent interconnection authority under PURPA section 210(a).[58]

Congress carefully constructed checks and balances in FPA sections 210 and 212 to assure that whatever interconnections were ordered would promote efficiency while protecting the safety and reliability of the utility. To infer that Congress intended PURPA section 210(a) to be independent authority without any mention of interconnection in the section, and without any support in the legislative history,[59] reflects the Commission's failure to

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[58] The FERC's construction would make the inclusion of cogenerators among those eligible to apply for an interconnection order under FPA § 210 surplusage. The FERC's brief attempts to show that its construction would not do so by offering two examples of cogenerators as applicants for interconnection orders other than those made unnecessary by the FERC's rules (FERC Br. at 38 n.39), but neither is correct. Its first example—to allow a cogenerator to use the lines of another such facility "to transmit power to a more distant utility" (*i.e.*, "wheeling")—is specifically dealt with in FPA § 211, not § 210. Under § 211, cogenerators are not among those eligible to apply for such an order. The second example—to allow a cogenerator selling power at retail under state regulation to obtain an additional supply of power it could draw upon to sell to *its* customers—is itself surplusage since a qualifying facility buying power for resale would be a "utility" under the FPA, and thus able to apply for such an order as a utility.

[59] *See* pages 37-41, *supra*. Diamond Shamrock's argument that PURPA § 210(f) inferentially authorizes the interconnection rule

"look to the provisions of the whole law, and to its object and policy." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 18 (1981).[60] While section 210(a) generally speaks of "rules . . . necessary to encourage cogeneration," such a "relatively *general grant* of authority" is controlled by the "relatively *specific limitation* on authority" of PURPA section 210(e)(3)(B), and "does not give the Commission a mandate to consign detailed provisions of PURPA itself to a wastebasket as meaningless surplusage." Pet. App. at B-24 (emphasis is the court of appeals').[61]

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is unpersuasive for the same reasons as the Commission's argument from § 210(a); and, further § 210(f) offers no basis for inferring authority to evade the clear command of § 210(e)(3)(B).

[60] Thus, even if PURPA § 210(e)(3)(B) did not exist, the Commission's interconnection rule still would be illegal.

[61] *See Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944). The "general grant of authority" referred to by the court of appeals included both PURPA § 210(a) (see Pet. App. at B-23), and FPA § 212(e), which provides that FPA § 210 does not limit, impair, or otherwise affect any authority of the Commission "under any other provision of law." Pet. App. at B-59. The FERC's assertion in the Order (which it has not advanced to this Court) that Congress intended this general savings clause to overcome the specific limitation in PURPA § 210(e)(3)(B) would violate the fundamental precept of statutory construction that all parts of a statute are to be given effect. *American Textile Mfrs. Inst.*, 452 U.S. at 513. PURPA § 210 is *not* a part of the FPA, and yet the Conference Report's discussion of the scope of the savings clause was confined to the FERC's authority under the FPA:

> Subsection (e) of new section 212 expresses the intention of the conferees that the authorities granted in sections 210 and 211 are in addition to and not in lieu of other authority the Commission may have *under the Federal Power Act.*

Conference Report at 94 (emphasis added). Such other provisions of the FPA include §§ 202(c) and 202(d), 16 U.S.C. §§ 824a(c), 824a(d) (Supp. V). Had the Conference Committee that adopted both PURPA § 210(e)(3)(B) and FPA § 212(e) intended the former to be limited by the latter, it would not have so confined its description of the scope of the savings provision.

The Commission's Order on Rehearing attempted to restrict the scope of the broad non-exemption language of PURPA section 210(e)(3)(B) by claiming that the provision contains an unexpressed distinction, that it only applies where a cogenerator is a "target" of an interconnection application, not where it is itself the "applicant." The Commission's explanation for this strained construct was that

> To "exempt" qualifying facilities does not mean to deny them a privelege [sic] or right to which they would otherwise be entitled; to exempt means to relieve of undesirable responsibility or obligation.

Pet. App. at B-181. The Commission reasoned that a cogenerator applying for an order sought a privilege (*i.e.*, a benefit) to which exemption was, on its theory, inapplicable, while a cogenerator that is a "target" of the application is subject to an "undesirable responsibility or obligation" (*i.e.*, a burden) to which the prohibition of exemption in section 210(e)(3)(B) would apply. Pet. App. at B-181-82.

None of the provisions of PURPA or the FPA contain any basis for this artificial distinction, nor does the legislative history. In fact, the Commission's strained construct would engraft a confusing limitation on an otherwise directly phrased statute.[62] In its brief on the merits, the FERC seems to abandon this elusive, indeed illusory, distinction.[63] The "burdens" and "benefits" contained in

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[62] The FERC's effort to explain its own burden-benefit argument (FERC's Petition for a Writ of Certiorari, Dkt. No. 82-226 [FERC Pet.] at 15), itself demonstrates the confusion created by this strained interpretation.

[63] The Commission now asserts that PURPA § 210(e)(3)(B) was intended only to prevent the Commission from reopening the "regulatory gap" eliminated by FPA § 210's extension of Commission power to otherwise nonjurisdictional electrical generators. FERC Br. at 45. This assertion depends entirely on the Commission's mistaken belief (discussed at pages 37-41 that Congress intended FPA § 210 to address "entirely distinct" concerns from those addressed in PURPA § 210.

FPA sections 210 and 212 are inextricably intertwined, in that an applicant seeking interconnection can obtain that benefit only by satisfying the supposedly burdensome requirements.[64] In seeking to deprive PURPA section 210(e)(3)(B) of meaning, it is the petitioners and not the respondent utilities that fail to construe the statutory provisions to give full effect to the statute as a whole, *see Market Co. v. Hoffman*, 101 U.S. 112 (1879); *Iglehart v. Iglehart*, 204 U.S. 478 (1907); and *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480 (1947); and, it is petitioners that seize upon a few general words to nullify specific conditions and requirements enumerated in the statute. *See Pennhurst State School and Hospital*, 451 U.S. at 18.

Had Congress wanted to limit the section's reach to qualifying facilities as targets only, it could have excluded them from the class of applicants.[65] Yet, FPA section 210 expressly provides that cogenerators may be both targets and applicants for interconnection orders.

D. The Contention that the Rule Has Harsh Policy Consequences Is Unfounded and In Any Event Does Not Justify Ignoring the Statutory Requirements

Petitioners and their *amici* supporters claim that the interconnection rule is necessary to avoid harsh policy consequences. Their claim is unfounded, and in any event would be insufficient to justify a rule that conflicts with the express terms of the statute.

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[64] The artificial nature of the burden-benefit distinction is underscored by Petitioners' own argument, in which they claim that the consequence of qualifying facilities' not being exempted from what they see as the benefit side of the issue (being able to interconnect) is that they will thereby endure what they claim will be great procedural burdens. API Br. at 38-41; FERC Pet. at 16.

[65] Congress made the converse of this distinction in its treatment of Federal power marketing agencies, including them as applicants for, but not as targets of, interconnection orders. *See* FPA § 210(a)(1)(A), 16 U.S.C. § 824i(a)(1)(A) (Supp. V).

Petitioners assert that hearings on interconnection orders under FPA section 210 would so burden affected cogenerators as to disrupt the entire program. But, FPA section 210(b)(2), 16 U.S.C. § 824i(b)(2) (Supp V), directs the Commission to "afford an opportunity for an evidentiary hearing," not to hold a hearing in all cases. As the cases cited by Kerr-McGee (Br. at 28-29) demonstrate, such a requirement often can be satisfied without an actual hearing—for example, only holding a hearing where the opposing party raises factual objections that are material under the statute.[66] Furthermore, as the Commission suggests in its brief (at 38-39), it might be able to determine generically and by rulemaking that qualifying facilities necessarily satisfy some of the requirements of FPA section 210, so that these questions would be eliminated as subjects of case-by-case consideration. *See Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-22 & n.17 (1973).

Petitioners' argument fails to recognize that Congress created the substantive and procedural requirements of FPA section 210 for important reasons. The legislative history reveals that Congress was acutely aware that interconnection involved complex technical issues which, if not properly resolved, could threaten the reliability and safety of the utility system.[67] Indeed, during the legisla-

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[66] API's claim that contested interconnection hea.ings at the FERC are now lengthy is based solely on cases concerning interconnections among utility systems (there having been, under the rule, no proceedings involving interconnections between cogenerators and utilities). While significant technical issues may be in dispute in proceedings involving cogenerators, those issues will be fewer in number and generally less complex than when interconnections among utilities are in dispute. The case of *Central Power & Light Co.*, 14 F.E.R.C. (CCH) ¶ 63,077 at p. 65,232 (1981), cited by API, is atypical even for inter-utility interconnections. It involved the "Texas problem," which was the subject of extensive litigation and Congressional concern prior to the passage of PURPA.

[67] *See, e.g.*, Blackout Hearings at 116-17 (Statement of FERC Chairman Curtis); *see also* 123 Cong. Rec. at 32397 (1977) (statement of Senator Johnston).

tive hearings, several witnesses specifically tied these concerns to interconnections between cogenerators and utilities.[68]

Because of these concerns over reliability and safety, Congress recognized that interconnection is an intrinsically federal concern. For example, addressing a proposed amendment dealing with interconnection and wheeling, Senator Durkin stated:

> I have argued quite strenuously today on the floor that the lowest level of government that can get the job done should be the highest level to get the responsibility. But this is one area, I think, where the federal presence is required. It is a problem that can only be resolved by the Federal Government, and I believe it is consistent with the approach I have taken to the utility regulatory reform proposals that we have been wrestling with in the past couple of days.[69]

Finally, assertions that the requirements of FPA section 210 are burdensome or that Congress' concern with the effects of cogenerator interconnections on the safety and reliability of utility transmission systems might have been misplaced cannot sustain the rule. Congress, and not the courts, "is the appropriate body to weigh the relevant, policy-laden considerations. . . ." *Bob Jones University v. Simon*, 416 U.S. 725, 750 (1974).

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[68] *See, e.g.*, House Hearings at 330 (Statement of George Oprea, Houston Lighting & Power Co.); *Id.* at 364 (Statement of Gerald Decker, Dow Chemical Co.).

[69] 123 Cong. Rec. 32675 (1977). *See also* 123 Cong. Rec. 31300 (1977) (statement of Representative John Dingell).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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